COLSTON vs. QUANDER.

DISTRICT COURT OF APPEALS.

DISTRICT IV.

COLSTON VS. QUANDER.

To the Honorable Judges of the District Court of Appeals for the Fourth Judicial District of Virginia:

The petition of John H. Colston respectfully represents that he is aggrieved by a final judgment of the circuit court of Alexandria county, Virginia, rendered at its February term, 1869, in a suit wherein your petitioner was plaintiff and Susan Quander was defendant.

A copy of the record in the case is herewith presented.

The facts of the case are sufficiently set forth by the special verdict found by the jury, namely: "The jury find that the land in controversy belonged in fee to Lewis Quander, a free man of color, that Quander intermarried with Susan Pierson, a woman of color, a slave belonging to Levi Burke, on the 11th June, 1842. The said Quander died on the 5th of May, 1864, intestate; that the said Susan Pierson was the slave of Levi Burke at the time of the marriage, and so continued until the abolition of slavery; that the said parties were married at the house of said Burke by Rev. Mr. Johnson, an Episcopal minister; that the said Quander lived with his wife during his life time and recognized her as such, and that he had several children, whom he recognized during his life as his, and who are now living; that John H. Colston, the plaintiff, was the half brother of Lewis Quander, being born of the same mother, and that there are no other children or descendents of said mother now living."

The question presented by this verdict was whether the second section of the act passed by the General Assembly of Virginia, on the 27th of February, 1869, which is in these words, "That where colored persons before the passage of this act, shall have

undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner as if they had been duly married by law, and all their children shall be deemed legitimate, whether born before or after the passage of this act. And when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate," applies to this case, and the court held it did. Your petitioner is advised that the said judgment of the circuit court is erroneous, and should be reversed, and assigns the following errors:

1st. That Susan Quander, the wife of Lewis, was a negro slave at the time of the pretended marriage, and was therefore incapable of contracting, and particularly by the *then* policy of Virginia, from making the contract of marriage. The marriage therefore was void abinitio, and the children bastards, incapable of inheriting from the father. No recognition afterwards could make the children legitimate, unless the act referred to applies. The distinction between expost facto and retrospective laws is recognized, but your petitioner contends that the authorities cited by defendant's counsel have no bearing upon the question at issue.

2nd. The act continues, "And when the parties have ceased to cohabit before the passage of this act in consequence of the death of the woman, or from any other cause, all the children of the woman recognized by the man to be his shall be deemed to be legitimate." Susan Quander is still living, and continued to cohabit with Lewis until his death. The other cause referred to, may be where the woman deserts the man, or declines to live with him as his wife. *After they cease to cohabit*, the man must recognize the children, which recognition must be after the passage of the act. As Quander died before the passage of the act, he had no opportunity to legitimate the children by recognition. It is an act required to be done by the man, for the law leaves him the option. No act of the woman can effect the status of the children. At the time of the death of Quander his children were incapable of inheriting, and the descent was immediately cast upon Colston, by virtue of which the property vested in him. No after legislation could effect his rights; they became perfect, and if a law *could* be passed to divest title, its terms should be so clear as not to admit of any other construction. The cases cited by the defendant's counsel in the court below do not go to the extent contended for. On an examination it will be found that the authorities relied on

decide that the Legislature may by subsequent acts perfect an inchoate right, though by the operation of the law it may have a retrospective effect, and others may be injured by it. No case has gone to the extent that the Legislature can take one man's property away from him and give it to another, or in the language of Judge Chase in Colder vs Bull, 3rd Dallas, page 388, "take property from A and give it to B." It is against all reason and justice for a people to entrust a Legislature with such powers, and therefore it cannot be presumed that they have done it and a fortiori, it cannot be presumed that the Legislature intended to pass a retrospective law. The language of the law under discussion is prospective in its terms. The parties must be cohabiting at the time of the passage of the act, in which event the children are made legitimate. No recognition is necessary, and the consequences of a valid marriage follow; but if they be not cohabiting from any cause whatever, subsequent recognition must take place.

As before stated the cases cited by the counsel for the defendant in the court below, have no application, and to demonstrate this, your petitioner will analyze them:

For the *the* facts in Colder vs. Bull your petitioner refers the court to 3rd Dallas 386. No right had vested in Colder, or in other words, his rights were in litigation at the time the law passed. The will under which Bull and wife claimed was in the first instance disapproved—a law was passed for a new hearing, and under the proceedings had therein, the court approved the will, and admitted it to probat. Bull and wife, devisees under the will, were barred all right of appeal (18 months having elapsed) and the resolution was pas*t* to enable them to appeal.

No rights of property was disturbed, but a remedy *only* was given to prosecute rights; nonconstat, but that *B*ull upon the merits of the controversy had a better right to the property than Colder, and for the interposition of the Legislature in his behalf the presumption is that he had. If the court will examine carefully the opinion of Judge Chase, it will be seen that he utterly repudiates the idea that it is in the power of the Legislature to disturb vested rights, and that he declares in the most emphatic language that such an act would be in violation of the social compact, and not to be considered as a rightful exercise of legislative authority, 3rd Dallas 388. The legislature of Connecticut in passing the resolution was exercising judicial and not legislative functions.

See Mr. Justice Johnson's notes to Satterlee vs. Matthewson, 2nd Peters page 681. In Watson vs. Mercer, 8th Peters 88, there was a defective acknowledgment by a feme covert. The property being hers, she had a perfect right to dispose of it, and executed a deed for that purpose. The Legislature passed a law to cure the defect. The law was passed for the benefit of a pur-

chaser for a valuable consideration, who certainly had acquired rights. The decision goes to the extent substantially that the act is an explanatory one, altering the rule of evidence only.

3rd. In none of these cases has the naked question of divesting rights by retrospective legislation been decided, for the mere dicta of judges, cannot be regarded as authority. Under the *Constitution rights of property* can only be disturbed for public uses, and then just compensation must be made. If the power were inherent in government, why insert such a clause? The object was to give the power for public purposes, because without such grant its exercise would be in violation of our free institutions and the nature of a republican form of government.

The cases of Ash vs. Wray and Bennett vs. Tolen, relied on by defendant's counsel, have no application. In the first case the court decided that the child of the bastard could inherit through his mother from her father. In the second the question was in regard to the interpretation of a will.

For these and other errors apparent on the face of the record, your petitioner respectfully prays for a writ of error to the judgment complained of.

J. H. COLSTON, by
his Counsel,
G. W. BRENT,
W. H. DULANY,
C. W. WATTLES.

We, George W. Brent and C. W. Wattles, attorneys, practicing in the District Court of Appeals, for the 4th judicial district of Virginia, do certify that in our opinion there is sufficient matter for reversing the judgment complained of in the foregoing petition.

GEORGE WM. BRENT,
C. W. WATTLES.

To the Clerk of the District
Court of Appeals held at
Fredericksburg, Va.:

Supersedeas awarded. Bond to be given in the penalty of $200, conditioned as the law directs.

May 17th 1869.

W. WILLOUGHBY,
Judge.

VIRGINIA:

John H. Colston
vs.
Susan Quander,
} In Ejectment.

Pleas at the courthouse in the city of Alexandria, before the Judge of the circuit court for Alexandria county, on the 4th day February, A. D. 1869.

Be it remembered, that heretofore, to wit, at rules held in the clerk's office of the circuit court for Fairfax county on the first Monday in February, 1867, came John H. Colston by his attorney and filed his declaration against Susan Quander of a plea of ejectment, which declaration, together with the notice, the statement of the claim of the plaintiff for damages, and the proof of the service thereof, thereunder written, are in the words and figures following, to wit:

"State of Virginia:

Fairfax county, to-wit:

John H. Colston complains of Susan Quander for this, that
page 2 } heretofore, to wit, on the ——— day of ——— 18—, the said John H. Colston was possessed in fee, of a certain tract of land lying in the said county of Fairfax, containing one hundred and sixty three and eighteen hundredths acres, lying on the west side of Dogue Run, adjoining the land of Richard C. Mason (with the right of way to the pole road), being part of the woodlawn tract, and conveyed by Chalkley Gillingham and wife to Lewis Quander, by deed of January 1st, 1855, and recorded in Liber V. No. 3, folio 322, of the land records of said county. Also of a certain other tract of land in said county, containing twenty eight acres, on Dogue Run, adjoining Aaron Leggett, conveyed by Charles Gillingham and wife, to said Quander, by deed of September 30th, 1853, recorded in Liber T, No. 3, folio 121, of the said records, and being so possessed thereof, that the said defendant afterwards, to wit, on the ——— day of ——— 18—, at the county aforesaid, entered into the said premises, and that she, the said defendant, unlawfully withholds from the said plaintiff possession thereof, to the damage of the plaintiff $5000.

page 3 } And therefore he brings suit
BRENT & WATTLES,
DULANY & BALL } p. q.

"*To Susan Quander:*

You will take notice that on the first Monday (the 4th day) of February, 1867, I shall file in the clerk's office of the circuit court

of Fairfax county, the foregoing declaration.

JOHN H. COLSTON,
by Brent & Wattles and
Dulaney & Ball,
his attorneys."

{ Revenue Stamp $50 }

"In this case the plaintiff will demand of the defendant damages in the sum of $5000 00 for rents and profits of the said premises; and for *witholding* the possession of the said land to the amount of $5000 00."

"Executed by delivering a copy of the above to the defendant, Susan Quander, on the 9th January, 1867.

W. R. MILLAN,
Sheriff."

page 4 { And it appearing by the sheriff's return that the said Susan Quander hath been duly served with a copy of the said declaration, the notice thereunder written and the account of the plaintiff's claim for damages; and she not appearing, it is ordered that unless she do appear here at the next term and plead the general issue in the declaration, judgment shall be given for the plaintiff and a writ of possession awarded him.

And at another day, to wit, at rules held in the clerk's office of the said circuit court for Fairfax county on the first Monday in March, 1867,

This day came the plaintiff by his attorney, and, as well, the defendant by her attorney, in obedience to the rule issued against her in this cause, which rule is in the words and figures following, to wit:

"In the circuit court of Fairfax county,
February Rules 1867.

John H. Colston,
vs.
Susan Quander,
} Declaration in Ejectment.

page 5 { Declaration with proof of notice filed, and on *notion* of the plaintiff a rule is granted him against the said defendant to appear and plead at the next rule day, to wit, on the first Monday in March, 1867.

W. B. GOODING,
Clerk."

Endorsement:

"Executed by delivering a copy to Susan Quander.

W. R. MILLAN, Sheriff."

And the defendant by her attorney, for answer to the said de-

claration, saith, that she is not guilty as in the declaration alleged, to which plea the plaintiff replied generally and issue was joined.

And at another day, to wit, at a circuit court continued and held for the said county of Fairfax on the —— day of November, 1867,

This day came the parties, by their attorneys, and this cause, is, by consent of parties, ordered to be removed to the circuit court for Alexandria county for trial, with leave to either party to take depositions.

page 6 } And at another day, to wit, at a circuit court continued and held for the county of Alexandria, at the courthouse of said county, on the 15th day of November, 1867. This cause having been removed from the circuit court of Fairfax county to this court for trial, the same is ordered to docketed.

And at another day, to wit, at a circuit court continued and held for the said county of Alexandria, at the court house of said county on the 25th day of August, 1868, to which day this cause has been regularly continued; This cause is continued to the next term, for and at the costs of the plaintiff.

And at another day, to wit, at a circuit court continued and held for the county of Alexandria, at the courthouse of said county, on the 12th day of November, 1868,

This day came the parties by their attorneys, and thereupon came a jury, to wit, John Arnold, Wm. Johnson, L. H. Kell, J. S. Emerson, Joshua Hall, J. B. Hancock, P. G. Uhler, W. F. Dennis, R. C. Armstrong, Jesse Owings, G. Canning Wild, and James W. Atkinson, who being selected, tried and sworn the

page 7 } truth to speak upon the issue joined, upon their oaths, returned a special verdict in these words:

"We, the jury, sworn to speak the truth upon the issue joined, say that the land in controversy for which this suit is brought belonged in fee to Lewis Quander, a free man of color; that the said Lewis Quander intermarried with Susan Pierson, a woman of color, a slave belonging to Levi Burke, on the eleventh day of June, 1842; that the said Lewis Quander died on the 5th day of May, 1864, intestate; that the said Susan Pierson was the slave of Levi Burke at the time of the marriage and so continued until the abolition of slavery; that the said parties were married at the house of the said Burke, by the Rev. Mr. Johnson, an Episcopal minister; that the said Lewis lived with his wife during his life time and recognized her as such, and that he had several children whom he recognized during his life as his and who are

now living; that John H Colston, the plaintiff, was the half brother of Lewis Quander, being both born of the same mother, and that there are no other children or descendants of the said mother now living and that at the institution of this suit the defendant

page 8 } Susan Quander was in possession of the land in controversy. But whether or not upon the whole matter aforesaid the issue joined be for the plaintiff or defendant, the jury do not know, and therefore they pray the advice of the court and if upon the matter it shall seem to the court that the issue is for the plaintiff, then the jury find for the plaintiff upon the said issue, and in that case they find for the plaintiff the tracts of land in the declaration set out and described. But if upon the whole matter aforesaid it shall seem to the court that the issue is for the defendant, then the jury find for the defendant upon said issue.

WM. F. DENNIS,
Foreman."

And at another day, to wit, at a circuit court continued and held for the said county of Alexandria, at the courthouse of said county, at the same term, to wit, on the 17th day of November, 1868, "It is agreed between the parties by their counsel that the further argument in this cause may be submitted to the court in writing and that the decision of the Judge in vacation may be entered as the opinion of the court.

FRANCIS L. SMITH,
BRENT & WATTLES."

page 9 } And now at this day, to wit, at a circuit court continued and held for the said county of Alexandria, at the courthouse of said county, on the same day and year first herein mentioned, to wit, on the 4th day of February, A. D. 1869.

This day came the parties by their attorneys and thereupon the matters of law arising upon the special verdict in this cause being argued, it seems to the court here, that the law is for the defendant. Therefore it is considered by the court that the plaintiff take nothing by his bill, and that the defendant go thereof without day, and recover against the plaintiff her costs by her about her defence in this behalf expended.

Plaintiff's costs	$11 25
Defendant's costs	$17 44

A copy.

Teste:

J. TACEY, Clerk.

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